

Intellectual Property
Fall 2019
Final Exam

I graded, as I always do, using checklists. (E.g., “The ERDL pattern is an uncopyrightable government work under § 105.) The bullet points in the following outline do not correspond one-to-one to the items on my checklist, but they do reflect the overall weight I put on different parts of the analysis.

I gave one point for each item on the checklist that your answer identified and gave a substantially correct answer to. Identifying the issue with no analysis, or a significantly incorrect analysis, was worth half a point. A particularly good analysis of an item — either exactly and meticulously correct, or saying something interesting I hadn’t anticipated — was worth an extra bonus point. I reserved a final four points on each question for writing and organization. Overall scores on the exam ranged from 19 to 57.5, which I then mapped onto a letter-graded curve.

I will of course be happy to discuss your exams and your grades with you if you have any questions.

Question 1: Untitled Moose Game

Trade Secret

Escape Hatch (EH) may have a low-value trade secret misappropriation claim against Escape Your Troubles (EYT).

- Most of Escape Hatch's (EH) Moose Hunter escape room design cannot be protected as a trade secret, because it can be observed by players. EH cannot practically stop competitors from observing its puzzles or players from sharing details with the general public.
- For similar reasons, Geisel has not engaged in trade secret misappropriation by playing and observing Escape Your Trouble's (EYT)'s escape room.
- It is unlikely that EYT could have created a jacket with an identical pattern independently or from playing the Moose Hunter escape room. The most plausible story is that someone inside EH leaked the modified image. That leak might constitute trade secret misappropriation. The damages from this leak, however, are small enough that it is probably not worth pursuing this claim on its own.

Utility Patent

Nothing in the Moose Hunter design is suitable for a utility patent. The standard explanation of the reason why is that puzzle designs are abstract ideas.

Copyright

EH has a weak copyright infringement case against EYT:

- There are no substantial ownership issues. The copyrights in EH's employees' contributions belong to EH as works made for hire. Natasha's idea for a moose-themed escape room contained no copyrightable expression, so she is not a joint author.
- The idea of a moose-themed escape room set in a hunting cabin is not copyrightable; only the specific expression of that idea.

- Puzzle mechanics are not copyrightable as such; they are procedures or methods of operation under § 102(b). EH has no copyright in the idea of encoding secret messages in trail blazes.
- Specific details — like the photographs of hunters or the jacket pattern — may be copyrightable. Some puzzle details may be *scènes à faire*. Puzzle answers like T-H-I-D-W-I-C-K are uncopyrightable short phrases.
- The ERDL pattern is an uncopyrightable government work under § 105. Geisel’s modifications are a copyrightable derivative work under § 103(a).
- The jacket is a useful article, but the pattern is a separable aspect, so it remains copyrightable even when printed on a jacket.
- There is strong evidence of copying in fact by EYT. It had access to *Moose Hunter*, there are probative similarities in multiple puzzles, and the jacket is strikingly similar.
- Substantial similarity overall is debatable; many of the similarities are due to uncopyrightable aspects.
- Since legal recourse is unlikely, EH should consider publicly shaming EYT for ripping off its escape room design.

EH is vulnerable to a copyright infringement suit from Winnabango:

- The box art for *Moose Hunter 2018* is original and fixed.
- Foray engaged in wholesale copying of the protected expression in the *Moose Hunter 2018* cover art when she made the poster.
- EH has a weak fair use case. The use is commercial and minimally transformative.
- EH should make a new poster and stop using the box art.

Trademark

EH is vulnerable to a trademark infringement suit from Winnabango:

- The MOOSE HUNTER mark is descriptive for a game about hunting moose, but Winnabango almost certainly has achieved secondary meaning, making the mark protectable.

- Winnabango has priority from actual use of the game, whether or not the mark is registered. It is safe to assume that a “well-known” game is sold nationally.
- Point-of-sale confusion about source is possible. Escape rooms and video games are both types of interactive entertainment experiences, and the VR version of Moose Hunter brings them even closer. The marks are identical. The deliberate use of Moose Hunter 2018 box art could be construed as bad faith and also makes the marks in context visually identical.
- Winnabango has a strong claim for confusion about sponsorship or approval under § 43(a): adding “The Escape Room” to the MOOSE HUNTER mark makes it appear that the escape room is a continuation of the video-game series.
- EH has a weak descriptive fair use defense: “Moose Hunter” is descriptive of its goods, but by using the actual Moose Hunter 2018 box art, it went beyond the descriptive use of the term.
- EH has no nominative fair use defense: it does not need to refer to the video game to describe its escape room.
- EH has a weak parody defense. Neither the escape room nor the poster comments on the video game or uses it to make a point.
- EH should strongly consider changing the name of its escape room. MOOSE HUNTER might have been okay on its own, but given the history, EH should now consider steering clear entirely of the MOOSE HUNTER mark.

EH is not vulnerable to a trademark infringement suit from Gamewright:

- EH adopted the MOOSE IN THE HOUSE phrase in good faith and is arguably not even using it as a trademark. It is not the name of EH’s escape room and appears only in small text on the poster.
- EH has a strong descriptive fair use defense: there literally is a moose in the house in its escape room. (It is important here that Gamewright’s trademark does not give it a monopoly on all entertainment involving moose in houses, only the ability to prevent use of the mark in a confusing manner.)

EH has a weak trademark claim against EYT:

- The only common element between MOOSE HUNTER and MOOSE TROUBLE is MOOSE, which is descriptive of both escape rooms.
- The goods are very closely related.
- EH can argue that EYT created a moose-themed escape room to capitalize on the success of EH's escape room. But since EH has no exclusive rights in a moose-themed escape room as such, this by itself is not bad faith.

For what is worth, ESCAPE and ESCAPE ROOM are generic for escape rooms.

Trade Dress

EH's hunting-themed escape room design is probably not protectable trade dress

- It is unclear that the design itself is being used as a mark to indicate the source of goods, rather than as a product attribute. (*Cf.* BOSTON STRONG.)
- Even if EH has trade dress rights, there is a strong argument that the Moose Hunter room design, as an indispensable part of the interactive entertainment experience, is aesthetically functional.

Question 2: Snark Tank

MillionFootView

- YES, this business model poses no known IP risks. The use of satellite imagery and surveillance camera imagery is probably okay, even under *Christopher*, as all outdoor activity on public streets is regularly exposed to such view.
- I will assume that MillionFootView will negotiate proper licenses for the use of the imagery it buys.
- The general idea of predicting corporate events by watching traffic is not protectable under any IP regime, so MillionFootView cannot stop hedge funds from implementing it themselves.
- MillionFootView's success depends on the quality of its machine-learning algorithms and its software. It should maintain these as trade secrets and sell only the outputs: the predictions.
- MillionFootView does not need to worry that hedge funds will share the predictions it sells to them — the predictions are time-sensitive and their value consists in a competitive advantage over other investors. The hedge funds have every incentive to keep this information secret themselves so that their competitors cannot also trade on it.

Showtime Shakedown

- YES, this business model poses no known IP risks.
- Musicians who perform covers of copyrighted musical works infringe the public performance rights in those works. There is no defense under § 110(4) because most performers work for the “commercial advantage” of tips. Dancers who dance to recordings of these works also infringe the public performance rights.
- Neither the musicians nor the dancers infringe sound recording copyrights, because there is no non-digital public performance right for sound recordings.
- Thus, Showtime Shakedown's only plausible clients are musical-work copyright owners, most of whom are already represented by performance rights organizations.

- This is a difficult business model to make work: the sums involved are small, and many performers will hide rather than wait around to be served.
- There are no IP rights in the idea of doing such enforcement, and it is hard to see how Showtime Shakedown could obtain a competitive edge over the performance rights organizations.

Bats in the Belfry

- YES, this business model poses no known IP risks.
- Bats in the Belfry can obtain utility patent protection for the hardware and software features of its bats. I would like to know more about the prototype's features, history, and testing, but I currently see no obstacles to obtaining a family of utility patents covering multiple innovative aspects of the bats. Properly drafted, these patents may be broad enough to prevent other companies from introducing a robotic bat that can fly, navigate in the dark, or hang upside down.
- Bats in the Belfry can obtain copyright and design patent protection for the non-functional features of its bat design. These protections will prevent other companies from introducing visually similar toys, even ones that don't fly as well or have the same advanced features.
- ROBOBAT is a descriptive trademark, but it is appealing enough that it may be worth retaining. Perhaps using ROBOBAT in conjunction with the corporate BATS IN THE BELFRY mark could be a way to ensure protection while ROBOBAT builds up secondary meaning.
- The internal workings of the robotat, including its software, can be protected using copyright and trade secret. Some of these details will be subject to reverse engineering, but the patent and copyright protection should help against wholesale appropriation of the software.

Table for Two

- MAYBE this business model is safe, as long as Table for Two properly indicates that it is not endorsed by or affiliated with any of the restaurants whose reservations it sells.
- Table for Two should not count on utility patent protection. The idea of reselling restaurant reservations is too abstract to be proper

patentable subject matter. It is possible that Table for Two could develop specific implementation improvements to sufficiently apply the abstract idea, but the trend in Supreme Court caselaw is in the wrong direction.

- There are no IP rights in the general idea of reselling restaurant reservations. Table for Two will not be able to keep other companies from imitating the idea.
- Table for Two could protect some specific aspects of its platform, including the name (trademark), website design (copyright, trade dress), and back-end software (copyright, trade secret), but competitors can easily avoid the use of these aspects.

Candy Canes

- YES, this business model poses no known IP risks.
- The improved cane design, if it is as useful as described, will be eligible for a utility patent. (I would like to know more about the testing process to confirm that there are no issues with public use.) Improved comfort and lower fall risk are both sufficient utility. This patent could prevent competitors from copying crucial features like the angled handle and the spring-loaded base.
- The improved cane design is also a good candidate for a design patent. As long as the ergonomic grip is not the only possible comfortable grip, for example, it will be ornamental and thus eligible for a design patent.
- The design is probably not eligible for copyright or trademark protection due to its functionality.
- The name CANDY CANES is arbitrary for canes (CANES by itself is generic for canes and will need to be disclaimed) and is a good trademark.

Go Bananas

- MAYBE. This business model poses the risk of a trademark infringement suit from the Go Bananas event planning company. The services are unrelated and it appears that Go Bananas operates only in several other countries. Still, I would like to evaluate this use in more

detail to confirm that there are no other factors that could cause consumer confusion.

- Go Bananas does not currently have trademark rights in GO BANANAS simply from having the phone number 1-800-BANANAS. It will need to buy bananas.app from the current owner; it has no IP rights that would compel that owner to give up the domain.
- BANANAS is generic for banana delivery; GO BANANAS is descriptive or perhaps suggestive.
- There are no IP rights in the idea of delivering bananas quickly. The trademark by itself will not do anything to stop competitors from delivering bananas.